

ESTTA Tracking number: **ESTTA541902**

Filing date: **06/05/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91210400
Party	Defendant Janis Savitt
Correspondence Address	G. ROXANNE ELINGS DAVIS WRIGHT TREMAINE LLP 1633 BROADWAY FL 27 NEW YORK, NY 10019-6708 nytmpto@dwt.com;roxannelings@dwt.com;ch
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Lisa Keith
Filer's e-mail	lisakeith@dwt.com, roxanneelings@dwt.com, charleslegrand@dwt.com, nytmpto@dwt.com
Signature	/Lisa Keith/
Date	06/05/2013
Attachments	Savitt Declaration - Redacted.pdf(1406787 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Application Serial No. 85721117
Filed September 5, 2012
For the Mark JANIS BY JANIS SAVITT
Published in the Official Gazette (Trademarks) on February 26, 2013

MICHELLE SAVITT,

Opposer,

v.

JANIS SAVITT,

Applicant.

Opposition No. 91210400

**DECLARATION OF JANIS SAVITT IN SUPPORT OF
MOTION TO DISMISS OPPOSITION UNDER FED. R. CIV. P. 12(B)(6)**

I, JANIS SAVITT, declare as follows:

1. I am the Applicant in the above-captioned proceeding. I am also the owner of Designs by Janis Savitt, Inc. I make this Declaration in support of my Motion to Dismiss the Opposition action brought by Michelle Savitt ("MICHELLE").

2. As the Opposition alleges, M+J Savitt, Inc. ("M+J") was a designer and seller at wholesale of fine jewelry. Since 2009, M+J has not operated as an active company, but has engaged in activities only to the extent necessary to raise funds to pay off its substantial indebtedness. Since June 21, 2010, M+J has not sold any goods.

3. Since at least as early as December 31, 2008 and continuing to this day, M+J has had no employees and has paid no wages. There are three tax filings from 2008 that demonstrate that M+J stopped paying wages at this time. These documents are described in paragraphs 4 through 6 below.

REDACTED FOR CONFIDENTIALITY

4. Attached hereto as Exhibit A is a true and correct copy of the Form 941 for 2008: Employer's QUARTERLY Federal Tax Return for the months October through December.

5. Attached hereto as Exhibit B is a true and correct copy of the NYS-45-MN Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return for October 1 through December 31, 2008.

This was the final New York State tax return filed concerning the wages of M+J.

6. Attached hereto as Exhibit C is a true and correct copy of Form 940 for 2008: Employer's Annual Federal Unemployment (FUTA) Tax Return. This was the final federal tax return filed concerning the wages of M+J.

7. M+J has had no sales since June 2010 and only made those sales to pay off the substantial debts of M+J. This fact can be evidenced by the documents described in paragraphs 8 through 10 below.

8. Attached hereto as Exhibit D is a true and correct copy of the New York State and Local Quarterly Sales and Use Tax Return for the 2nd Quarter of 2010 (June 1, 2010 – August 31, 2010).

REDACTED FOR CONFIDENTIALITY

9. These gross sales were evidenced in the internal bookkeeping of M+J. Attached hereto as Exhibit E is a true and correct copy of the M+J Savitt Inc. Reconciliation Detail from Valley National Bank for the period ending June 30, 2010. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

10. M+J has had no sales since this date. Attached hereto as Exhibit F is a true and correct copy of the New York State and Local Quarterly Sales and Use Tax Return for the 3rd Quarter of 2010 (September 1, 2010 – November 30, 2010). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] No subsequent sales and use tax returns have been filed on behalf of M+J and M+J has had no subsequent sales.

11. I am the President of M+J and I am also on the Board of Directors of M+J. The Board of Directors has not held a meeting since 2008.

12. M+J was once owned and run by my family, but beginning in 2008, litigation brought the business to a halt. At that time, the shareholders of M+J were me, my sisters MICHELLE and Wynne Savitt (“WYNNE”), and my mother Mildred Savitt. My sisters and I each owned twenty-seven percent (27%) of M+J and my mother owned the remaining nineteen percent (19%). My father Paul Savitt was the President of M+J.

13. In 2008, WYNNE sued me, MICHELLE and my parents in federal court for the unauthorized use of M+J’s trademarks, along with a host of other claims, including breach of

REDACTED FOR CONFIDENTIALITY

contract, unjust enrichment, conversion, tortious interference with prospective business relations, breach of fiduciary duty, and a defamation claim against me. *See M+J Savitt, Inc. v. Janis Savitt*, No. 08-Civ-8535 (S.D.N.Y. 2008). In March 2009, the court granted a motion to dismiss all claims except the defamation claim. *See id.* (March 17, 2009 Opinion & Order). This claim was subsequently withdrawn and the remaining counterclaims were settled on July 16, 2009. As part of the settlement, WYNNE transferred her shares in M+J back to the corporation.

14. In 2012, MICHELLE sued me in New York State Supreme Court for unfair competition, breach of fiduciary duties, ouster, tortious misappropriation of design credit, conversion, embezzlement, and unjust enrichment. On February 21 2013, the court granted my motion to dismiss all claims brought by MICHELLE against me. A true and correct copy of the transcript of this oral argument is attached hereto as Exhibit G.

15. Today, M+J has three shareholders – myself, MICHELLE, and the Estate of Paul Savitt. MICHELLE and I have an approximately 36.43 ownership percentage in M+J and the Estate of Paul Savitt has an approximately 27.15 ownership percentage. A true and correct copy of an excerpt from M+J's 2012 U.S. Income Tax Return for an S Corporation that shows the allocation of shares in M+J is attached hereto as Exhibit H.

16. My parents Paul and Mildred Savitt are now deceased. My mother predeceased my father and left all her shares in M+J to him. In my father's will, he left these same shares to me. The validity of these wills has been contested by my sisters in the Surrogate's Court of New York County.

17. M+J maintains no corporate office. To the best of my knowledge, M+J's former corporate office location was closed in or around 2009 after the federal litigation settled. Since

REDACTED FOR CONFIDENTIALITY

that time, M+J has engaged in activities only to pay off its substantial indebtedness. These activities have been conducted out of my residence in Manhattan.

18. I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 5, 2013 at New York, New York

s/Janis Savitt/

Janis Savitt

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **DECLARATION OF JANIS SAVITT IN SUPPORT OF MOTION TO DISMISS** was duly served upon Opposer at the below address:

Michelle Savitt
12 East 86th Street #429
New York, NY 10028

by mailing a copy thereof via the U.S. Postal Service in a sealed envelope via First Class Mail with postage thereupon fully prepaid on the 5th day of June, 2013.

Date: June 5, 2013

s/Lisa D. Keith/

Exhibit A

This Exhibit has been designated as Confidential

Exhibit B

This Exhibit has been designated as Confidential

Exhibit C

This Exhibit has been designated as Confidential

Exhibit D

This Exhibit has been designated as Confidential

Exhibit E

This Exhibit has been designated as Confidential

Exhibit F

This Exhibit has been designated as Confidential

Exhibit G

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: **PART: 53**

-----X
MICHELLE SAVITT and M + J SAVITT,

Plaintiffs,

-against-

INDEX NO.
101200/12

GREENBERG TRAUIG, LLP, PAUL D.
SCHINDLER, G. ROXANNE ELINGS, JANIS
SAVITT and DESIGNS BY JANIS SAVITT, INC.

Defendant.

-----X

60 Centre Street
New York, New York 10007
February 21, 2013

B E F O R E:

THE HONORABLE CHARLES E. RAMOS,

J U S T I C E

A P P E A R A N C E S:

PALANT & SHAPIRO, P.C.
Attorneys for Plaintiffs
225 Broadway - Suite 630
New York, New York 10007
BY: ALEXANDER SHAPIRO, ESQ.

STEPTOE & JOHNSON, LLP
Attorneys for Defendants Greenberg Traurig,
Paul Schindler and G. Roxanne Elings
1114 Avenue of The Americas
New York, New York 10036
BY: JUSTIN Y.K. CHU, ESQ.

LITMAN, ASCHE & GIOIELLA, LLP
Attorneys for Defendants Janis Savitt and
Designs By Janis Savitt
140 Broadway
New York, New York 10005
BY: RICHARD M. ASCHE, ESQ.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

THE COURT: Good afternoon, everyone.

We are going to start with whose Motion to Dismiss first?

MR. CHU: It's both defendants' Motion to Dismiss and, if I may, if your Honor allows, I will go first.

THE COURT: Please.

You represent?

MR. CHU: Good afternoon, your Honor. My name is Justin Chu. I am from the law firm of Steptoe & Johnson. We are counsel to Greenberg Traurig and Paul Schindler and Roxanne Elings, the two attorneys handling this.

This is an action for legal malpractice and for other claims related to Greenberg Traurig's representation of plaintiff in the trademark action that was litigated before Judge Cote in the Southern District of New York right next door.

We have before your Honor defendant Greenberg Traurig's Motion to Dismiss the nonlegal malpractice claims and they are breach of fiduciary duty claim, fraud claim and a claim for breach of violation of Section 487 of the judiciary law.

We are moving on the grounds that those claims are duplicative of the malpractice claim, number one,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

and, number two, that they are otherwise insufficient as a matter of law. And we'll discuss that in a bit of detail.

But, I want to just give your Honor the background of the underlying case.

The infringement action involves a dispute between plaintiff's sister and other members of their family concerning the family's jewelry business, manufacturing business.

Plaintiff's sister, whose name is Wynne Savitt, filed the infringement action initially against plaintiff's other sister, Janis, who is a defendant here, and their father for trademark infringement and other claims.

The action was filed on Wynne's personal behalf as well as purportedly on the behalf of the family's business, company, whose name is M + J Savitt.

In that action, plaintiff here gave an affidavit that she did not approve of the underlying infringement action. She also gave deposition testimony that she did not support the lawsuit.

She further testified that she refused to support the lawsuit when she was offered by Wynne the opportunity to make millions of dollars in that lawsuit.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

THE COURT: So this is what I didn't understand when I read the file. This plaintiff was not the plaintiff before Judge Cote?

MR. CHU: That is correct.

The plaintiff here was not a defendant -- was not a plaintiff in the case before Judge Cote. She was not a party initially but subsequently she became a defendant.

THE COURT: So Greenberg Traurig was representing her sister?

MR. CHU: Correct. Their father, and as well as the plaintiff here today against Wynne on the other side.

THE COURT: Wynne was the plaintiff before Judge Cote. The defendants before Judge Cote were this plaintiff --

MR. CHU: Correct.

THE COURT: -- and the other defendants here?

MR. CHU: Say that again.

THE COURT: The defendants before Judge Cote constituted this plaintiff and the other members of the family?

MR. CHU: Yes. Against the other sister, Wynne.

THE COURT: Right, Wynne.

MR. CHU: Wynne was the plaintiff in that action

1

2

against --

3

4

THE COURT: And the plaintiff and those other defendants won before Judge Cote; correct?

5

MR. CHU: Yes.

6

THE COURT: Okay.

7

8

9

10

11

12

MR. CHU: So what happened before Judge Cote was that after some intense months of litigation, on an expedited basis, Judge Cote, in March 2009, dismissed all of the derivative claims on the ground that neither demand on the board of directors nor the futility of demand was shown.

13

14

THE COURT: There were only derivative claims in that action?

15

16

17

18

MR. CHU: There were other claims, as well. There were also individual claims for fraud, for breach of contract, for unjust enrichment and also for defamation.

19

20

21

22

23

Judge Cote also dismissed all but one of the individual claims filed by Wynne., that is, the defamation claim. So, by Judge Cote's order of March 2009, all that is left, all that was left in that action was the individual claim for defamation.

24

THE COURT: I see.

25

And that is the claim that was settled?

26

MR. CHU: The case was subsequently settled in

1
2 its entirety. And I'll go into that. But let me just
3 say one more thing about what Judge Cote did.

4 Subsequent to her March 2009 order, the Judge
5 issued a later order and found that plaintiff, in the
6 infringement action, that is Wynne, engaged in abusive
7 litigation and in order to win a financial settlement
8 from the defendants.

9 THE COURT: I read the decision.

10 MR. CHU: So I won't go further then.

11 So, subsequent to those two orders, the case
12 collapsed and was settled for no money exchanged.

13 What did happen in the settlement was that Wynne
14 was required to return her shares in the company to the
15 treasury of the company.

16 THE COURT: M + J.

17 MR. CHU: M + J.

18 THE COURT: M + J was the defendant?

19 MR. CHU: Well, M + J was a purported derivative
20 plaintiff.

21 THE COURT: So she was suing on behalf of
22 M + J --

23 MR. CHU: Correct.

24 THE COURT: -- when she sued the rest of the
25 family.

26 MR. CHU: Correct.

1

2

THE COURT: Now she has withdrawn from M + J.

3

She has given up her stock.

4

MR. CHU: That is correct.

5

THE COURT: I understand.

6

So Wynne now is out of the picture.

7

MR. CHU: Wynne now is out of the picture as far

8

as M + J is concerned. And by the way, there is really

9

no more M + J because it exists as an entity but is no

10

longer functioning as a business since Janis, who is

11

represented by counsel here, left the company some time

12

in 2007.

13

THE COURT: Okay.

14

MR. CHU: Now, plaintiff here today, Michelle,

15

is seeking to reverse the field and now says, well, had

16

I been properly advised, I would have joined Wynne in

17

that action to sue the other members of the family;

18

contrary to her sworn testimony.

19

THE COURT: Well, there was a bit of a family

20

fight going on because the mother passed away and there

21

is a probate fight. Now, where is that probate going

22

on? Here in New York?

23

MR. CHU: The probate action, I believe counsel

24

is also representing the plaintiff in the probate

25

action. We are not involved in that.

26

THE COURT: Is that here in Manhattan?

1
2 MR. SHAPIRO: Yes, your Honor, in Surrogate's
3 Court, New York County.

4 MR. CHU: We do not represent any parties in
5 that action. The three sisters are the litigants in
6 that case in the probate action and Greenberg Traurig
7 does not represent any of those sisters in that
8 proceeding.

9 THE COURT: All right, so plaintiff's claim
10 here, Michelle's claim here is that she should have
11 been a plaintiff in Wynne's action, okay.

12 MR. CHU: Correct, correct. And she says that,
13 well, I would have been the plaintiff had Greenberg
14 Traurig told me that the underlying action had merit
15 instead of telling me that the underlying action had no
16 merit.

17 She also contends that Greenberg Traurig
18 misadvised her when Greenberg Traurig said to her, yes,
19 we can represent you jointly with the other members of
20 the family.

21 And she also contends that Greenberg Traurig did
22 not advise her of the conflict of interest which I
23 believe, whatever facts giving rise to that, are
24 obvious to the family.

25 So, I will go into the legal arguments.

26 THE COURT: Yes.

1

2

MR. CHU: So, there are -- let me just back up one bit.

3

4

5

Michelle here also, in addition to her personal claims, purports to sue on behalf of M + J, as well.

6

And the claims are the same so I am just going to speak as if there is one claim rather than two of the same claims.

7

8

9

10

All of the claims are based on the same allegations that we just talked about; that is, Greenberg said the infringement action had no merit and that we could represent you jointly.

11

12

13

THE COURT: What are the Causes of Action being brought against the law firm?

14

15

MR. CHU: For legal malpractice, number one. We are not moving on that.

16

17

Breach of fiduciary duty, fraud and for violation of Judiciary Law Section 487.

18

19

THE COURT: 487 is making false statements in court?

20

21

MR. CHU: That is exactly right. And we are not -- it's about misstatements to the court, it's about deceit. That is not the kind of action we are talking about in this case.

22

23

24

25

Now, they label our action as intentional act, as intentional deceit but, your Honor, those are just

26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

labels. The facts are what matter.

THE COURT: All right, so your argument is that these are repetitive, redundant.

MR. CHU: They are duplicative and your Honor knows that when the different Causes of Action are based on the same fact, seeking the same damages, they are --

THE COURT: What would keep this out of the rule that this would just be a malpractice claim and not have these other --

MR. SHAPIRO: There are various differences in the present situation. Here you have Greenberg Traurig and its attorneys representing Janis Savitt for years prior to this litigation being commenced. Thereafter, Greenberg Traurig needed to get a strategic advantage in order to get the case dismissed on procedural grounds; namely futility of demand or the demand should be excused. So, in so doing, on November 18th, 2008, when they were hosting a meeting of the shareholders, at that meeting they misrepresented to my clients that there were no meritorious Causes of Action that could possibly be asserted against Janis Savitt or her company; that her --

THE COURT: I am a little confused now.

Are you saying that there was a demand made?

1
2 MR. SHAPIRO: Previously, Wynne started the
3 lawsuit only against Janis and against -- against Janis
4 Savitt, Designs by Janis Savitt, which is a company
5 solely owned by Janis, and against Paul Savitt who was
6 in his 80s and their father. My client, Michelle
7 Savitt, did not want to take sides at the time. She
8 didn't want to sue her father. She was invited then by
9 Greenberg Traurig, by Roxanne Elings, by Paul
10 Schindler, the partners of that firm, to attend a
11 shareholders meeting on November 18th, 2008. During
12 this meeting, the complaint alleges specifically,
13 express misrepresentations were made to the M + J board
14 and to Michelle Savitt to the fact that there were no
15 meritorious Causes of Action that could be asserted
16 against Janis; that the Causes of Action --

17 THE COURT: Judge Cote dismissed the derivative
18 Cause of Action on a technical ground; that there had
19 been no proof of a demand or of demand futility.

20 MR. SHAPIRO: Correct. But that was after.

21 THE COURT: How did what happened at this
22 meeting with Greenberg Traurig affect that?

23 MR. SHAPIRO: Very simple; because the case was
24 commenced before this November 18th meeting. At that
25 point in time, the board constituted different members,
26 so Greenberg Traurig wanted to switch the constituency

1
2 of the board, so at that point the plaintiff could no
3 longer claim that the majority of the board was self
4 interested so they added Michelle Savitt to the board
5 of directors at that time and they removed Wynne from
6 the board of directors.

7 THE COURT: This was done after the lawsuit was
8 started.

9 MR. SHAPIRO: The first lawsuit. There was --
10 the first lawsuit. There was a complaint, then they
11 filed an amended complaint. Thereafter, plaintiffs'
12 lawyers sought leave of the court to file, I believe, a
13 second amended complaint in that case. So, after the
14 very first complaint was filed --

15 THE COURT: When Judge Cote decided her motion,
16 was she dismissing based upon the lack-of-futility
17 allegation at the filing of the initial complaint or
18 the amended complaint?

19 MR. SHAPIRO: Amended complaint. The court
20 held --

21 THE COURT: So you are saying between the time
22 of the original complaint and the amended complaint,
23 Greenberg Traurig manipulated the board of directors so
24 that any demand on the board would be futile.

25 MR. SHAPIRO: Would not be deemed futile.

26 THE COURT: Would not be deemed futile.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

MR. SHAPIRO: Correct, precisely. It was a litigation strategy.

And this is where the --

THE COURT: And how did they change the board so it would not become futile? By putting Michelle on the board?

MR. SHAPIRO: Correct. And because the original complaint did not allege that Michelle had any pecuniary interest in the alleged misconduct of Janis, that kind of reversed the status quo as it existed at the time when the original complaint was filed and, hence, procedurally, the complaint was defective and the amended complaint was defective and for this reason the case was settled purely on the technical grounds, never reaching the merits of the underlying claims --

THE COURT: It wasn't settled. It was dismissed. You have no interest in the defamation claim, I take it.

MR. SHAPIRO: No, no. There were a lot of claims included in the prior complaint which, if I may say the word --

THE COURT: Again, what you are saying is that you're accusing Greenberg Traurig of malpractice, of failing -- you are saying we have an existing attorney-client relationship that went back apparently

1

2

for years.

3

MR. SHAPIRO: With only Janis. Not with

4

M + J.

5

THE COURT: With Janis, yes.

6

With Michelle or no?

7

MR. SHAPIRO: No, with Janis, who -- not with

8

Michelle. Never with my client.

9

THE COURT: So Michelle was not an existing

10

client.

11

MR. SHAPIRO: No. Janis was. And Greenberg

12

Traurig was representing Janis --

13

THE COURT: When did Michelle become a client of

14

Greenberg Traurig?

15

MR. SHAPIRO: After this November 18th, 2008

16

meeting -- and this is where it gets kind of

17

interesting. This case is very factually interesting.

18

After the November 18th meeting --

19

THE COURT: This is before the second amended

20

complaint?

21

MR. SHAPIRO: Before the amended complaint

22

because the amended complaint, which is filed after

23

this meeting, my client, Michelle, was now joined in

24

that lawsuit as a defendant.

25

THE COURT: When did Michelle first become a

26

client of Greenberg Traurig?

1
2 MR. SHAPIRO: Whether she was served with the
3 papers, Greenberg Traurig advised her, Michelle, there
4 is no need for you to get independent counsel. It's
5 good to have all the representation under one roof. We
6 will represent you. We will also represent M + J, we
7 will also represent your sister, Janis, and we will
8 also represent your father.

9 They never disclosed, as required by the rules
10 of disciplinary conduct, that there is a conflict of
11 interest --

12 THE COURT: All you are talking about is
13 malpractice then. They didn't act as a trustee, they
14 didn't act as a director of the corporation; did they?

15 MR. SHAPIRO: No, at that point they did not,
16 no.

17 THE COURT: But isn't the claim for malpractice
18 sufficient?

19 MR. SHAPIRO: Well, if I may, your Honor -- I
20 don't know if counsel is still going to finish his
21 argument before I can fully respond or --

22 THE COURT: Fully respond; because right now you
23 are not doing too well, believe me.

24 MR. SHAPIRO: Okay, can I just start going
25 through all of the claims in order? Because we have in
26 this case the fraud claims, the breach of fiduciary

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

duties claims --

THE COURT: What fraud? Your client, Michelle, was not a client of Greenberg Traurig until after --

MR. SHAPIRO: -- she was enjoined in the lawsuit.

THE COURT: Correct. So what communication was there between the law firm and Michelle that wasn't in the context of an attorney-client relationship?

MR. SHAPIRO: Well, on February 18th -- on November 18th when they had this shareholder meeting, this is when Michelle first started communications with Greenberg Traurig. This is where the partners of Greenberg Traurig did everything they could to persuade Michelle not to proceed on her own with any claims. At that point, they indicated to her, they expressly represented, as the complaint alleges, there are no meritorious Causes of Action that are certain in the --

THE COURT: They are giving legal advice. I'm not saying it's not actionable because how many categories are we going to put this in? You can only recover once, you know.

MR. SHAPIRO: At the time, when the legal advice was suppose-- this supposed legal advice was made, our position was it wasn't legal advice. It was an intentional misstatement, they knew it was false

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

because, in fact, there were meritorious Causes of Action that could have been asserted and, hence, there is the intentional misrepresentation made to my clients. That's number one.

Number two --

THE COURT: Hang on. Hang on.

She is a shareholder at the time; right?

MR. SHAPIRO: Correct.

THE COURT: What is the fact that you say -- that you say was knowingly misrepresented to Michelle?

MR. SHAPIRO: Two things. Number one, that there is no viable or meritorious cause of action which Michelle or M + J could maintain against Janis or her company. That's the first --

THE COURT: But now they are stepping into the shoes of being an attorney.

MR. SHAPIRO: This is before that.

THE COURT: No, no, no. Trust me. What you're telling me was said to Michelle falls into the context of legal malpractice. An attorney cannot give legal advice to someone even if there is no retainer agreement and say, oh, there was no attorney-client privilege -- relationship, rather. No; by making a statement like that, that implicates that person's status as an attorney.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

MR. SHAPIRO: Even if that is the case --

THE COURT: I'm not suggesting that what went on there is not actionable, because that's not before me right now, but only whether or not it falls into the category of fraud or if it's subsumed in legal malpractice.

MR. SHAPIRO: Correct, your Honor. Maybe I am getting too technical here and --

THE COURT: This is a very technical issue.

MR. SHAPIRO: It is.

So here -- we can distinguish two situations: When an attorney renders legal advice and that advice happens to be wrong, negligence, unreasonableness, legal malpractice.

What if you have a lawyer that makes a statement to a prospective client and when making that statement the intent is not to render legal advice; it's legal advice in disguise.

THE COURT: But that is the issue that always comes up in these cases and the courts from here to the Court of Appeals have always said it's legal malpractice.

MR. SHAPIRO: There is one case, though, from the 1st Department, which upheld --

THE COURT: Fraud that is independent entirely

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

of any legal advice.

MR. SHAPIRO: In that case, there was a failure to disclose a certain inability of the firm to fully represent the clients to begin with. When the firm -- it's ability to render the representation from the get go --

THE COURT: But that didn't happen here.

MR. SHAPIRO: Again, they also represented that there was no need for them to get independent legal counsel for the purpose of Michelle and M + J not getting legal counsel so that they could be controlled by Greenberg Traurig so they could win that case.

This is an unusual case in this regard, your Honor.

THE COURT: You're still talking malpractice.

MR. SHAPIRO: Okay, if I may move away from the --

THE COURT: Sure.

MR. SHAPIRO: -- fraud, and I would like to go to Section 487 because Section 487 I can see is the most applicable one. And I understand that the defendants' position with respect to fraud because on the one hand, misconduct here is egregious as alleged, and intentional, but there are fine, technical ways to distinguish it, but maybe it's not even important to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

get into it.

Section 487, it's a very old section. It is quasi criminal in nature. It was specifically reserved for situations where there is misconduct of attorneys. And this is fully independent of legal malpractice, meaning that under this section, you could have legal malpractice and still a Cause of Action under Section 487.

And it's stated on Page 7 of plaintiff's brief in opposition to defendant Greenberg Traurig's motion.

Section 487 provides, "An attorney or counselor who, number one, is guilty of any deceit or collusion or consents to any deceit or collusion with intent to deceive the court or any party or, number two, willfully delays his client's suit with a view towards his own gain, or willfully receives any money or allowance for or on account of any money which he has not laid out or becomes answerable for, is guilty of a misdemeanor and, in addition to the punishment prescribed therefore by the penal law, he forfeits, to the party injured, treble damages to be recovered in a civil action." And this has goals from protecting the public from the attorneys --

THE COURT: Don't preach to me. Let's talk about how the case law follows that section, because I

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

don't think it's applicable here.

MR. SHAPIRO: This complaint alleges that Greenberg Traurig, with specific knowledge --

THE COURT: Doesn't a 487 claim have to be in the representation of a party?

MR. SHAPIRO: Any party in the lawsuit, actually, but they were represented by Greenberg Traurig.

Case law provides, your Honor, that any party, even the opposing party or the party being represented --

THE COURT: Where in the complaint do you describe that Cause of Action?

MR. SHAPIRO: The complaint makes very, very -- a high number of references to the misconduct. And I have a section in the plaintiff's brief, and I am just going to get it, which references all the sections describing the misconduct.

Just as one example, Paragraph 53 of the amended complaint provides, "In misrepresenting that the claims asserted in the prior action --

THE COURT: You don't even have a demand on this Cause of Action; do you?

MR. SHAPIRO: Yes, I do. It's the last one or one of the last ones. But the allegations on which it

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

is based --

THE COURT: The last one is unjust enrichment or an injunction.

MR. SHAPIRO: One second. Let me just get it, your Honor.

(Brief pause.)

THE COURT: Is there an amended complaint?

MR. SHAPIRO: Yes, there is an amended complaint.

THE COURT: I am looking at the complaint. That's only 60 pages long. Where is the amended complaint?

MR. SHAPIRO: It's on Page 55 of the complaint.

THE COURT: You say Paragraph 53?

MR. SHAPIRO: Paragraph 53 is one of the paragraphs where the complaint begins discussing --

THE COURT: "In misrepresenting that the claims asserted in the prior action had no merit whatsoever, defendants were aware of the falsity of the representations and made misrepresentations knowingly, willfully and deliberately with the specific intent of misleading plaintiff, Michelle and M + J." That's what you say rises to the level of a misdemeanor?

MR. SHAPIRO: This is what rises to the level of deceit. This is a misrepresentation.

1

2

3

You have here, your Honor, a situation where there is a conflict of interest. The attorneys --

4

5

6

THE COURT: You are not talking here about conflict of interest. You are saying here that there was a misrepresentation that the claims had no merit.

7

8

9

MR. SHAPIRO: What I am trying to describe, your Honor, is in totality. This is one critical element. One critical element.

10

11

But what I am also saying is that, in total, you have a situation where the lawyers should not --

12

13

THE COURT: Do you also have a Motion to Dismiss?

14

15

MR. ASCHE: Yes, your Honor. It's different legal issues entirely.

16

17

18

THE COURT: Come back at 2:15. We are going to have to -- we are going to spend the rest of the day on this.

19

20

21

MR. ASCHE: Would it be possible to make it a little bit later? I have a conference call with an attorney --

22

23

24

THE COURT: 3 o'clock.
(Whereupon, a luncheon recess was declared and taken.)

25

26

* * *

(A F T E R N O O N S E S S I O N)

MR. CHU: Before we left, your Honor expressed skepticism on the 487 claim that the alleged conduct rises to a level of Judiciary Law 487 claim and your Honor was giving counsel the opportunity to present facts to the court that would, in their opinion, give rise to their claim.

THE COURT: I am looking at the allegations of the complaint. I have done some research over the lunch break. I don't see the kind of pattern that the appellate courts have been speaking of with regard to this kind of behavior. This simply seems to be an opinion of counsel.

MR. SHAPIRO: Well, two things, your Honor.

The Section 487 claims fall into two categories. One is the chronic delinquency --

THE COURT: And the other problem is I believe the allegations that you have made in the complaint relate to a time before there was a lawsuit pending.

MR. SHAPIRO: That is incorrect, your Honor. The allegations already pertain to the prior federal court proceedings and, in substance --

THE COURT: Oh, the federal court proceeding.

MR. SHAPIRO: The federal court proceedings, yes.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

THE COURT: Was Michelle a party there?

MR. SHAPIRO: Yes, she was. And Greenberg Traurig represented parties with conflicting interests.

THE COURT: But wait a minute.

The allegations that form the basis of your claim is that Michelle was told, before she was a party, that there was no merit to Wynne's claim and to oppose it at meeting.

MR. SHAPIRO: That was part of it in relation to the fraud claims.

The allegations go on to state, with specificity, that the defendants deceived -- after Michelle was already being represented by Greenberg Traurig --

THE COURT: The allegations in the complaint allege that before Michelle was a party to the action and before there was an action, these misrepresentations -- sorry. Before she was a party to the action, these misrepresentations were made; right?

MR. SHAPIRO: Correct. That's part of it only.

The allegations go on to say that after Greenberg Traurig officially represented Michelle and M + J, made formal appearances on their behalf in court, conducted depositions and so forth, they intentionally deceived M + J and Michelle into entering

1
2 a stipulation of settlement, which was against their
3 interest, and they did so by intentionally
4 misrepresenting and concealing the fact that there were
5 no meritorious Causes of Action --

6 THE COURT: What was the meritorious Cause of
7 Action?

8 MR. SHAPIRO: If your Honor had a chance to look
9 at the prior complaint from the prior action, you had
10 essentially a family business. It is a family context;
11 family drama, of course, but that doesn't take away
12 from what happened.

13 It was formed in 1972. The business grew to a
14 certain level of prominence. It was essentially owned
15 by three sisters. M + J essentially stands for
16 Michelle and Janis. Wynne, the eldest sister, she was
17 like the business manager. Back in 2007 or so -- this
18 is based on the prior allegations -- Janis started --
19 she opened up a competing venture, started to divert
20 M + J's clients, including Ralph Lauren and big
21 accounts, started infringing on its trademarks --

22 THE COURT: Wait a minute. What trademark?
23 That was her name.

24 MR. SHAPIRO: There was actually a ruling by the
25 United States Trademarks Office refusing Janis Savitt
26 the right --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

THE COURT: What trademark did M + J have?

MR. SHAPIRO: They had at least three trademarks at a point in time.

THE COURT: But not Janis Savitt's name as a trademark.

MR. SHAPIRO: They actually had, for 16 years, permitted Janis Savitt to use her own name --

THE COURT: Permitted Janis Savitt to use her own name? This is ludicrous.

MR. SHAPIRO: Your Honor, in connection with the M + J marking. It was Janis Savitt for M + J.

THE COURT: Was there a written agreement between Janis Savitt and M + J with regard to giving her name to M + J?

MR. SHAPIRO: I'm sorry, your Honor?

THE COURT: Pursuant to what right did M + J have to appropriate to itself Janis' name?

MR. SHAPIRO: M + J didn't appropriate to itself Janis' name. What ended up happening, because the name "Savitt" had been used --

THE COURT: But she is her name. She is entitled to use it. You can't trademark her name.

MR. SHAPIRO: Your Honor, I'm not an expert on trademark law and I'm not prepared to discuss the details of the trademark law right now, except suffice

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

to say that when I reviewed the file, there were determinations made by the United States trademark office --

THE COURT: That's nonsense. Please, I read that. That's nonsense already. Don't try to confuse me with that kind of nonsense. That really is.

What is the basis of the claim that you say now is meritorious that Wynne had against M + J?

MR. SHAPIRO: For one, unfair competition with the company by directly accessing the company's client base; by transferring those clients --

THE COURT: What obligation -- who were the defendants in the federal action?

MR. SHAPIRO: Janis Savitt, Designs by Janis Savitt, Inc.

THE COURT: That's her company.

MR. SHAPIRO: Paul Savitt.

THE COURT: Her father.

MR. SHAPIRO: Mildred Savitt.

THE COURT: Her mother. This is ludicrous.

MR. SHAPIRO: It is, your Honor.

THE COURT: No, I'm talking about your complaint, but go ahead.

MR. SHAPIRO: But it was not my -- I did not represent --

1

2

THE COURT: You are the one that is saying this has merit.

3

4

5

MR. SHAPIRO: I'm not expressing any opinion as to whether or not there is any merit against defendants Paul Savitt or Mildred Savitt.

6

7

8

THE COURT: No, no, you are. You are saying that is the meritorious case. That is the very basis of the malpractice claim against Greenberg.

9

10

MR. SHAPIRO: Yes, it is. As against Janis Savitt and her company.

11

12

The allegations in the prior complaint were very detailed --

13

14

THE COURT: What kind of restrictive covenant was there between Janis Savitt and her family company that prevented her from going into business?

15

16

MR. SHAPIRO: First of all, at the time she was --

17

18

THE COURT: Answer my question. Was there?

19

20

MR. SHAPIRO: In writing, not that I am aware of. In writing, there was nothing like that that I am aware of.

21

22

THE COURT: Are you suggesting there was an oral agreement?

23

24

MR. SHAPIRO: There was an oral agreement with respect to Janis not using her name in a separate

25

26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

venture in competition with M + J for 16 years.

THE COURT: You have got to be kidding.

MR. SHAPIRO: But that is a small part of it.

THE COURT: Small part of it? That's nonsense.
Did you ever hear of the Statute of Frauds?

MR. SHAPIRO: But the contract was carried out,
it was performed.

THE COURT: It has to be conduct that was only
attributable to this alleged oral agreement. Did Janis
ever say there was an oral agreement?

MR. SHAPIRO: Not -- I haven't conducted
depositions of Janis. In the prior case, as far as I
understand --

THE COURT: Who were the parties to the oral
agreement? The mother, the father and Janis; right?

MR. SHAPIRO: No, it was M + J and Janis Savitt.

THE COURT: Who owned M + J when it was formed?
The parents; right?

MR. SHAPIRO: No. My understanding was
Michelle, Janis and then Wynne joined the company
later. Mildred, the mother, owned a minority interest
only because --

THE COURT: So the company was not formed by the
parents?

MR. SHAPIRO: No, it was not. It was formed by

1

2

Michelle, it was formed by Janis. That is my understanding. It was not formed by the parents.

3

4

5

6

7

8

9

And Janis Savitt was a director of the company, an officer of the company at the time. She started to divert its clients and compete with its business operations. She owed fiduciary duties to M + J at that time not to injure it by competing with it, by diverting its clients, its accounts and other things.

10

11

So, this was far more than the trademark issues and any restrictive covenants.

12

13

THE COURT: So you are saying that there was -- there is no writing between Janis and M + J?

14

15

16

MR. SHAPIRO: Maybe in the course of discovery I could find out. As of now, I do not have anything in my possession.

17

18

19

20

21

And to my understanding, in the prior case discovery did not extend that far. That is my understanding right now, but I could be wrong about that because issues in the prior case primarily involved futility of demand --

22

23

24

25

THE COURT: When did Janis leave M + J?

MR. SHAPIRO: She never really left M + J. She still remains as director and officer. She never really left M + J.

26

THE COURT: Michelle lives in California; right?

1

MR. SHAPIRO: No, she lives in New York.

2

3

THE COURT: Who lives in California?

4

5

6

MR. SHAPIRO: Her husband. She lives here. She lived in California herself maybe a brief period of time, but then she moved back to New York.

7

8

THE COURT: When did Janis allegedly start to compete with M + J?

9

MR. SHAPIRO: According to court records, 2006.

10

THE COURT: And the percentage ownership?

11

12

MR. SHAPIRO: I believe it was 27 percent for each sister and the remainder was owned by the mother.

13

14

15

16

THE COURT: So you are saying majority interest was not inclined to bring the lawsuit and Judge Cote ruled that there was no -- there were no interested directors other than Janis?

17

18

MR. SHAPIRO: Correct, your Honor. And this was only possible after Michelle joined the board.

19

20

21

22

THE COURT: And what was the nature of the misrepresentation -- you said it a number of times that there was no merit to the case. What specifically was said?

23

24

25

26

MR. SHAPIRO: Specifically, it was said that the allegations in the Wynne Savitt action cannot be proven and that essentially if M + J would pursue its own remedies against Janis, they would lose. Essentially,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

this would be a big waste for the company. And I am essentially paraphrasing from the complaint.

And then subsequently, Greenberg Traurig advised --

THE COURT: Those, I suppose, were factual allegations. Didn't Michelle have any information about the company? She is a director.

MR. SHAPIRO: She was director after she joined. She understood that the company was in financial trouble, but she deferred to these attorneys. She never consulted with her own attorney prior to Greenberg Traurig.

THE COURT: The attorneys aren't going to know anything about what was happening factually.

She was a shareholder; right?

MR. SHAPIRO: Correct.

THE COURT: Always?

MR. SHAPIRO: She was always a shareholder.

Prior to the November 18th shareholder meeting, Michelle was not an officer of the company.

THE COURT: So she knew nothing about what was going on?

MR. SHAPIRO: She knew certain things. I can't represent --

THE COURT: Did she work in the company?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

MR. SHAPIRO: During that period of time, she actually moved to California to stay with her husband for about a one- or two-year period, then she moved back to New York.

THE COURT: Did she ever work at the company beforehand?

MR. SHAPIRO: Yes, she did. She did --

THE COURT: Was she there when Janis was supposedly competing?

MR. SHAPIRO: She was there for about 30-something years and she did understand that there were -- your Honor, she understood -- she knew that she wasn't happy with Janis's conduct, but she was a lay person and she could not attribute --

THE COURT: I hope you have adequately advised your client as to what the sanctions are for bringing frivolous litigation. I am getting a really bad feeling about this case. I know there is a will contest going on and if you think you are going to use litigation in the commercial division to get an advantage in the surrogate's proceeding, you're sadly mistaken. If you don't have meritorious Causes of Action and a good basis for meritorious Causes of Action, I will entertain a motion for sanctions. This does not sound good at all.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

MR. SHAPIRO: This case has nothing to do with the will contest. Initially, only after the will contest, Michelle --

THE COURT: Counselor, I may have been born at night but I wasn't born last night. This has everything to do with the family. You know it and I know it.

Your action under 487 doesn't make the grade. Not under these allegations. There has to be a pattern of egregious conduct to sustain these --

MR. SHAPIRO: If I may just reference a few cases?

THE COURT: No, we're not going to go through that.

The motion is granted to the extent of dismissing the repetitive Causes of Action; everything except the malpractice and the 487 claim.

Now, you had a motion.

MR. ASCHE: Yes, your Honor.

THE COURT: You represent?

MR. ASCHE: Janis and her company.

THE COURT: Okay.

MR. SHAPIRO: I'm sorry, your Honor, if I may inquire, will the court render a written decision?

THE COURT: You'll find out if I do. You will

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

be the first to know.

MR. ASCHE: Your Honor, as I say in my motion papers, the case is really two cases.

THE COURT: Yes.

MR. ASCHE: And it's divided temporally as well as by legal theory.

Everything prior to the settlement of the federal action is alleged against Greenberg Traurig but not against Janis or her company because Michelle and Janis exchanged releases. So, what is being alleged against Janis is allegedly what happened after that case was settled.

She alleges, essentially, two Causes of Action in her own individual capacity.

THE COURT: Not derivatively.

MR. ASCHE: And several derivatively.

I will address each of the two individual claims separately because they are different. The derivative claims, I think, stand or fall together.

The fourth Cause of Action is an individual claim alleging a breach of fiduciary duty.

In our motion papers, we assert that she didn't allege any individual harm; that all of the harm she alleged was to the company and, under the classic case law, she had no individual claim for breach of

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

fiduciary duty.

In his responsive papers, counsel -- we made that motion originally addressed to the first complaint.

THE COURT: First complaint, right.

MR. ASCHE: The day before the motion was -- before his motion papers were due, he filed an amended complaint which mooted the first complaint and he added a factual -- the only factual claim that he added was a claim that at some point unstated, in some amount unstated, on some credit card unstated, for some purpose unstated, the plaintiff charged expenses of the company --

THE COURT: The defendant charged.

MR. ASCHE: The plaintiff charged.

THE COURT: The plaintiff charged?

MR. ASCHE: The plaintiff charged expenses of the company to her personal credit card; in other words, paid company expenses personally.

THE COURT: Oh, with her credit card.

MR. ASCHE: Yes.

THE COURT: Paid company expenses.

MR. ASCHE: Now, this is in the amended complaint; not in the original complaint.

THE COURT: This is against Janis?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

MR. ASCHE: Yes.

And her claim against Janis, your Honor -- and this is the only breach of fiduciary duty claim that he tries to defend in his responsive papers -- is that Janis did not pay off this -- did not pay Michelle for this credit card debt from the company while, at the same time, reimbursing herself for credit card debt that she incurred.

There is no specification of any kind in the amended complaint and none in the responsive papers explaining what this stuff was. And a fiduciary duty claim --

THE COURT: Hang on.

What obligation does the plaintiff claim Janis had to do anything?

MR. ASCHE: She claims that Janis was running M + J.

THE COURT: Okay.

MR. ASCHE: And that Janis had control over the checkbook of M + J and should have reimbursed her for her credit card expenses.

THE COURT: So she is seeking to hold Janis responsible for M + J's obligation.

MR. ASCHE: It gets worse.

She is not even claiming in this case to be

1
2 reimbursed for those credit card expenses. She is
3 claiming that Janis's failure to reimburse her for
4 credit card expenses has ruined her credit and she is
5 seeking, like, \$2 million worth of damages for that.

6 MR. SHAPIRO: That's not accurate.

7 THE COURT: All right, let's make sure we are
8 talking about the right thing.

9 What is the claim?

10 MR. SHAPIRO: Okay, the claim is that while
11 Janis is presently controlling the company as its
12 officer, director, she deprived all access to corporate
13 records to my client -- and we have her letters
14 essentially confirming it. And Janis and my client
15 both had credit card expenses, debts they incurred on
16 behalf of the company. So while Janis --

17 THE COURT: So they would go out and use a
18 product or take an airplane trip or whatever and then
19 the company would reimburse them?

20 MR. SHAPIRO: Correct.

21 So what Janis did is she reimbursed herself for
22 her own expenses but not for Michelle's. And under the
23 case law, there is a fiduciary duty owed by those in
24 control to at least treat the shareholders equally, and
25 this was disparaging treatment --

26 THE COURT: But that is treatment as a

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

shareholder.

MR. SHAPIRO: Correct.

THE COURT: This is not treatment as a shareholder. This is treatment as an officer and employee of the company. It's the company obligation. It's is not Janis's obligation to repay. We all know that. It is a company obligation.

MR. SHAPIRO: Correct.

THE COURT: You are saying there is some wrongful activity going on stopping the company from reimbursing -- if she needs to be reimbursed, bring a lawsuit against M + J Savitt, Inc.?

MR. SHAPIRO: Because Janis took the money out of M + J herself and she is not presently in possession.

THE COURT: All you need is a judgment against M + J and you can pursue whatever you want to pursue.

MR. SHAPIRO: With respect to the credit card claim, I expect to withdraw the claim to simplify things because I know this complaint has a lot of things in it and I want to simplify things.

THE COURT: It's one of the longest complaints I have ever seen.

MR. SHAPIRO: So we can dispense with the issue of the individual claims.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

THE COURT: That's out.

What else is --

MR. ASCHE: You are withdrawing all the individual claims?

MR. SHAPIRO: The one relating to the credit card.

MR. ASCHE: Your Honor, there is no other claim that she has standing to raise individually that I am aware of. The only other thing that he has mentioned is denial of access to the books and records.

First of all, Michelle resigned as an officer and director of the company, so she is not entitled to participate in the management. She is a shareholder and she could bring a claim under the business corporation law --

THE COURT: Is it a New York corporation or Delaware?

MR. ASCHE: I think it's New York.

MR. SHAPIRO: I believe it is New York.

MR. ASCHE: She could bring a claim under the business corporation law to examine the books and records of the company. In 64 pages, that's the one claim that's not there. She is not -- she doesn't have a claim under that section in this case.

MR. SHAPIRO: Your Honor, if I may also respect

1
2 your standing, as a director at the present time, as an
3 officer, she did send an e-mail resigning but
4 thereafter she withdrew it and thereafter, as acting as
5 a director and as an officer -- there were corporate
6 resolutions signed by her and by Janis and Michelle
7 being the director after the resignation.

8 All I'm saying, your Honor, is a question of
9 fact as to whether she resigned or whether she is
10 presently a director.

11 THE COURT: Have you made a claim in this action
12 to see the books and records? What counsel is saying
13 is you haven't made that claim and I am asking you:
14 Have you made the claim?

15 MR. SHAPIRO: We did not specifically reference
16 that section of the business corporation law.

17 THE COURT: What is left in the case as against
18 Janis then?

19 MR. SHAPIRO: Okay, as against Janis, the
20 complaint alleges that after the settlement of the
21 prior action -- M + J was already not as good of a
22 company as it was before because its goodwill, assets
23 were compromised, but it still had substantial amounts
24 of inventories. For example, Greenberg Traurig was
25 holding onto substantial sums. Everything was released
26 to Janis. And while depriving Michelle access and

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

while she is running the show, she is transferring these inventories to her own companies, Designs By Janis Savitt, she is selling M + J goods online as her own and at the same time using M + J as a forum --

THE COURT: So this is a derivative claim.

MR. SHAPIRO: Yes, the substance of the claim is really derivative.

THE COURT: So you are saying this is M + J's property.

MR. SHAPIRO: Correct.

And the only arguments on the Motion to Dismiss is that my client allegedly has unclean hands; a very factually specific argument.

THE COURT: I agree. The sisters are going to point fingers at each other for the rest of their lives, most likely.

How do you dismiss the derivative claim, then?

MR. ASCHE: Your Honor, the derivative claim, the defense is that she had unclean hands.

THE COURT: That's the defense.

MR. ASCHE: Yes. But the papers -- we're asking you to treat it as a summary judgment motion. In our motion papers, we cite chapter and verse. We have exhibits which show hundreds of M + J items being sold on eBay by her husband and her. She has a store in

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

California -- I don't know how she manages it living in New York, but she has a store in California with photographs of M + J jewelry on display in that store.

In her reply papers, she refutes -- we have several allegations, very detailed allegations in motion papers with exhibits. She refutes one of them, I think, accurately. She did return that jewelry, although I am sure she took it with the intent not to, but she did return it.

The others, she admits having sold M + J jewelry, herself or her husband, on eBay or through her store and she claims, as a defense, that she is holding it in trust for M + J and against her credit card debt which she claims she incurred, but she admits having done this.

There are, in addition, about 275 items which she doesn't admit that she took from M + J but she admits she has.

THE COURT: Is the derivative claim an equitable claim that can be defeated by unclean hands?

MR. ASCHE: Well, we cite cases, your Honor, that say that it is. It's an -- I don't know -- the cases we cite say that it's a derivative claim. They have been treated as derivative claims. It is a version, I suppose, of the general doctrine that if

1
2 somebody comes into court and, you know, has done the
3 same thing the plaintiff has done, the court is not
4 going to get involved and referee a dispute between two
5 people who have done a wrong thing.

6 By the way, Judge, I have to say this, even
7 though it's not relevant to the motion: My client --
8 there is nothing in the complaint -- compared to the
9 detail that I have in my motion, there is nothing in
10 the complaint that shows any basis for her belief that
11 my client has done anything wrong with this company.
12 It's 64 pages of basically repetitious stuff. But if
13 you parse it out, there is zip, nothing at all, no
14 facts which, in any way, would lead anybody to believe
15 that my client has taken anything from this company;
16 and, in fact, she hasn't.

17 In contrast, we cite chapter and verse -- we
18 have pictures of jewelry which this person, this
19 plaintiff put on eBay and tried to sell for her own
20 account. I think, your Honor, that you have the power
21 to dismiss the derivative claims because the plaintiff
22 does not have clean hands, doesn't come into court with
23 clean hands.

24 THE COURT: What authority do you have for that?
25 That's a defense -- an affirmative defense I am not
26 aware of.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

MR. SHAPIRO: May I respond?

THE COURT: Well, I am asking what his authority is. It's an interesting idea. I just don't know if it works.

MR. ASCHE: Thank you.

THE COURT: There are a lot of interesting ideas in this case. I don't know if any of them work.

MR. ASCHE: Well, we cite cases -- they are not recent -- well, one of them is. Corral v. Savory, for the proposition a shareholder's derivative claim is an equitable claim; Sakow versus 633 --

THE COURT: When was that decided?

MR. ASCHE: The Court of Appeals case was 1937. The New York 1st Department is 2006.

Gardner v. Leitgeb and Vitelli, 34 Misc.3d --

THE COURT: What is the cite of the Appellate Division?

MR. ASCHE: It's in our brief, but I can give you the -- 25 AD3d 418.

THE COURT: One moment.

(Brief pause.)

THE COURT: You're right. Derivative claims are equitable in nature.

Plaintiff, what are we going to do with this now?

1

2

MR. ASCHE: The question, your Honor, really is
this --

3

4

THE COURT: I asked him a question.

5

6

Your client has admitted doing what she is
complaining --

7

8

9

10

MR. SHAPIRO: Absolutely not. And if your Honor
looks at the affidavit of my client, it will explain
everything much better than I can since we are dealing
with questions of fact.

11

12

THE COURT: Where is Michelle's affidavit, since
you said that she will explain it better?

13

14

MR. SHAPIRO: I have a copy here, your Honor.

15

THE COURT: I should have a copy right here.

16

MR. ASCHE: I have a copy.

17

THE COURT: Where do I look?

18

19

20

21

MR. SHAPIRO: Well, the affidavit explains all
of these allegations about stealing things, not
returning things to M + J and clearly all of defendant
Janis' allegations and claims are rebutted by my
client.

22

23

24

At the very least, there is a question of fact;
not on a Motion to Dismiss without any discovery being
done. This isn't the time and place for this.

25

26

THE COURT: Well, in her affidavit, she says she
returned all this stuff.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

MR. ASCHE: Your Honor, if you look at
Paragraphs 34 and 35.

THE COURT: Okay. I wasn't that far along.

MR. SHAPIRO: Your Honor, sorry to interrupt,
but Paragraph 34 is to be read together with the
preceding paragraphs to set the foundation.

THE COURT: Motion granted. It's dismissed.

MR. SHAPIRO: Your Honor, if I may --

THE COURT: -- on the basis of the admissions in
her own affidavit.

MR. SHAPIRO: Your Honor, before this, in the
affidavit, it provides that the company, after the
prior lawsuit, each party, Janis gave Michelle certain
items to sell. Michelle is selling them, she is
holding them in trust. She is telling Janis let's have
the meeting. Janis refuses.

On top of that, we cited case law saying that
even if somebody has unclean hands but somebody else is
alleged to have unclean hands to a greater extent, then
this remedy cannot be invoked.

(PLEASE CONTINUE ON FOLLOWING PAGE)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

THE COURT: Thank you very much, gentlemen. We
are done.

MR. SHAPIRO: I just want to note my exceptions
on the record for both motions.

THE COURT: You don't have to put anything on
the record. That is my ruling.

CERTIFIED THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT
OF THE ORIGINAL STENOGRAPHIC MINUTES IN THIS CASE.



ERIC ALLEN
SENIOR COURT REPORTER

Exhibit H

This Exhibit has been designated as Confidential